84-1223

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HERMAN C. DAVIS, WARDEN,
Petitioner,

vs.

JAMES ANDERSON STOKES,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the state trial court's jury instructions on the element of malice violate *Sandstrom v. Montana,* 442 U.S. 510 (1979), by shifting the burden of proof on that element to the defendant?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit was filed on October 15, 1984, and appears as Appendix A.

The unpublished order of the United States Court of Appeals for the Sixth Circuit, denying the suggestion for a rehearing en banc, was filed November 28, 1984, and appears as Appendix B.

The unpublished order of the United States District Court for the Western District of Tennessee, granting the writ of habeas corpus, was filed on March 30, 1984, and appears as Appendix C.

The unpublished opinion of the Court of Criminal Appeals of Tennessee, affirming the trial court's judgment, was filed on June 12, 1980, and appears as Appendix D.

The unpublished order of the Supreme Court of Tennessee, denying discretionary review, was filed on September 8, 1980, and appears as Appendix E.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 15, 1984. Suggestion for a rehearing en banc was sought by the petitioner, and was denied on November 28, 1984. This petition was filed within sixty days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C. Const. amend. XIV, §1:

> No state...shall...deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

The respondent, James Anderson Stokes, was indicted by a Shelby County Grand Jury for murder in the second degree[1] while employing a firearm[2] in the slaying of Clarence Pritchard and was tried by a jury. The State's proof indicated that the respondent went to a home in Memphis where the victim was a visitor and, in the presence of several eyewitnesses, pulled a pistol and shot him, remarking, "The dirty son-of-a-bitch ought to have been dead long ago." The respondent did not dispute the fact that he shot the victim with a gun he had bought just a few hours earlier, but claimed that the gun discharged ac-

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[1] Tenn. Code Ann. §39-2-201:

If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

Tenn. Code Ann. §38-2-202(a):

Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

Tenn. Code Ann. §39-2-211(a):

All other kinds of murder shall be deemed murder in the second degree.

[2] Tenn. Code Ann. §39-6-1710(a):

Any person who employs any firearm or any explosive device while committing or escaping from a felony is guilty of a felony, and on conviction of the first offense shall be punished by imprisonment in the penitentiary for five (5) years and on conviction of a second offense shall be punished by imprisonment in the penitentiary for ten (10) years.

cidentally as he handed it to the victim, who had asked to see the gun. The respondent said the victim "grabbed it and it went off." "What caused it to go off," he testified, "I don't know."

Following the proof, the trial judge charged the jury on the applicable law, including verbatim the Tennessee Pattern Jury Instructions on second degree murder. The jury was instructed in part as follows:

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the state has proven beyond a reasonable doubt that a killing has occurred, then it is presumed that the killing was done maliciously, but this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the state.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances.

After retiring to deliberate, the jury returned and asked the court to further explain the malice instructions. The trial court declined, but reread the instructions on second degree murder. The jury retired again and, after further deliberation, returned with a verdict finding the respondent guilty of second degree murder and sentencing him to twenty-five (25) years in prison, enhanced by a five (5) year penalty for employing a firearm in the commission of a felony.

On appeal, the respondent challenged, *inter alia,* the malice instructions on the ground that they impermissibly shifted the burden of proof on that element. The Court of Criminal Ap-

peals of Tennessee rejected the contentions and affirmed the trial court's judgment. The Supreme Court of Tennessee denied the respondent's application for permission to appeal.

Subsequently, the respondent through counsel filed a petition for the writ of habeas corpus in the United States District Court for the Western District of Tennessee, alleging that the trial court's malice instructions violated due process of law pursuant to *Sandstrom v. Montana,* 442 U.S. 510 (1979). The district court agreed and granted a writ of habeas corpus ordering the State of Tennessee to retry the respondent within a reasonable period of time or release him. This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit. A suggestion for a rehearing en banc was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Erroneously Found That The Trial Court's Jury Instructions On Malice Violated Due Process.

The Court of Appeals has misapplied the holding of this Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Furthermore, this Court should take this opportunity to determine under what circumstances the overall jury charge precludes a finding that the challenged instructions create a burden-shifting presumption on a particular element of the offense. The decision of the Court of Appeals for the Sixth Circuit is directly in conflict with the subsequent decision of the Supreme Court of Tennessee in *State v. Bolin,* 678 S.W.2d 40 (Tenn. 1984), wherein the highest state court has determined that similar malice instructions do not violate the principles laid down by this Court in *Sandstrom.* It is probable that the Tennessee state courts will apply *Bolin* in similar cases and affirm the convictions, while the federal courts, adjudicating the constitutionality of the instructions on habeas corpus review will probably adhere to the decision of the Court of Appeals in this case. Therefore, this Court should grant the writ of certiorari and review the issue presented in this case.

In *Sandstrom,* the defendant was charged with "deliberate homicide", defined in the Montana statute as a criminal homicide committed "purposely or knowingly." Sandstrom admitted the homicide at his trial, but insisted that he did not commit the crime "purposely or knowingly." He argued that the jury instruction, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts", had the effect of shifting the burden of proof to him on the issue of whether the defendant acted "purposely or knowingly." *Id.,* at 512-513.

This Court said that the threshold inquiry in determining the constitutionality of such an instruction was to determine the nature of the presumption it described, which determination required:

> "careful attention to the words actually spoken to the jury, see *Id., [Ulster County Court v. Allen,* 442 U.S. 140, 99 S. Ct. 2213 (1979)] at 157-159, n. 16, 99 S. Ct., at 2225, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

Id., at 514. In *Ulster,* the Court distinguished between the two types of evidentiary devices, the permissive inference and the mandatory presumption. The permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the State of the basic fact and places no burden of any kind on the defendant. The mandatory presumption tells the triers of fact that they must find the elemental fact upon proof of the basic fact unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. *County Court of Ulster County v. Allen,* 442 U.S. 140, 156-157 (1979).

In *Sandstrom,* this Court concluded that a reasonable jury could have interpreted the jury instruction "as a direction to find intent upon proof of the defendant's voluntary action (and their 'ordinary' consequences) unless *the defendant* proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent." *Id.,* at 517. That conclusion was based upon the force of the words, "the law presumes", and the failure of the trial judge to instruct that the jury presumption could be rebutted.

Montana's Rules of Evidence expressly state that the presumption at issue could be overcome only "by a preponderance of evidence contrary to the presumption." This Court concluded that both the burden of production and the ultimate burden of persuasion on the issue of intent were thus shifted to the defendant in violation of the due process principles that protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant was charged.

The petitioner submits that the words of the presumption in this case, the immediate context in which they appear, and the overrall context of the jury instructions, distinguish this case from the due process violation in *Sandstrom.*

The words of the presumption in the instant case are more permissive than "the law presumes that a person intends the ordinary consequences of his voluntary acts." The instruction in the instant case immediately stated that the presumption may be "rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the State." Thus, there was no suggestion that such evidence must have been established by the defendant or that he had any burden of proof with respect to them. *Sandstrom* repeatedly emphasized the significance of the failure to tell the jury that the presumption could be rebutted.

The instructions further provided that the defendant was *presumed innocent;* that it was encumbent upon the State to prove each element of the offense beyond a reasonable doubt; that the jury should look to all facts and circumstances developed by the evidence to determine whether the *state* has proven beyond a reasonable doubt the existence of malice; and that if the jury had a reasonable doubt as to whether the killing was done with malice, then the defendant could not be guilty of murder in the second degree and the jury must acquit him of that offense. (Dist. Ct. Ex. 3, vol. IV, pp. 218-234).

This Court has consistently recognized that, "a single instruction to a jury may not be judged in artificial isolation but must be viewed in the context of the overall charge." *Cupp v. Naughten,* 414 U.S. 151, 146-147 (1973). The overall charge in this case precludes a legal finding that a reasonable language as a mandatory presumption shifting the burden of proof to the defendant on the element of malice.

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

NO. 84-5324

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed October 15, 1984]

James Anderson Stokes,
Petitioner-Appellee,

vs.

Herman C. Davis, Warden,
Respondent-Appellant.

On Appeal From The United States District Court
For The Western District Of Tennessee

Before: MARTIN and CONTIE, Circuit Judges; and
PECK, Senior Circuit Judge.

PER CURIAM. The State appeals the district court's grant of appellee Stokes' petition for writ of habeas corpus. The State contends that the district court erred in concluding that the state court's jury instructions on malice violated due process by impermissibly shifting the burden of proving the existence of malice beyond a reasonable doubt from the prosecution. The State also contends that, even if the instruction violated due process, the evidence of malice was overwhelming and rendered the error harmless. For the reasons expressed below, we affirm.

The State and Stokes presented conflicting versions of the facts at trial and on appeal. Witnesses Irene West and M. L. Brooks testified that on December 10, 1978, Stokes entered West's house uninvited and shot Clarence Pritchard. The witnesses testified that Stokes emptied the shells from his gun

into an ashtray and stated that "the dirty son-of-a-bitch needed to be dead a long time ago."

Stokes testified that Brooks had called him and invited him to the house. Stokes further testified that he entered the house, was introduced to everyone, and stood near the heater. At this point, Pritchard questioned Stokes about a gun Stokes had with him. As Stokes passed the gun to Pritchard, the gun went off and Pritchard was killed. Stokes testified that he did not know Pritchard and had no hatred for him.

On April 27, 1979, Stokes was convicted of second-degree murder in Shelby County Criminal Court. Stokes' conviction was affirmed by the Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee denied Stokes' application for permission to appeal. On March 9, 1983, Stokes filed a petition for a writ of habeas corpus in the district court for the Western Division of the Western District of Tennessee. On March 30, 1984, the district court granted the petition and ordered the State to release Stokes or retry him within a reasonable time.

The challenged instructions provided:

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the state has proven beyond a reasonable doubt that a killing occurred, then it is presumed that the killing was done maliciously, but this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the state.
>
> Likewise, if a deadly weapon is handled in a manner so as to make the killing a natural or probable result of such conduct, then there is raised a presumption of malice sufficient to support a conviction of murder in the second degree unless it is rebutted by other facts and circumstances.

The due process clause of the fourteenth amendment requires that the State prove every element of a criminal offense beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364 (1970); *Conway v. Anderson,* 698 F.2d 282, 284 (6th Cir.). *cert. denied,* ____ U.S. ____, 103 S.Ct. 3092 (1983). An instruction that creates a presumption shifting the burden of persuasion to the defendant on any element of an offense violates due process. *Sandstrom v. Montana,* 442 U.S. 510, 524 (1979); *Phillips v. Rose,* 690 F.2d 79, 81 (6th Cir. 1982).

Malice is an essential element in establishing the offense of second-degree murder under Tennessee law. *Wilson v. State,* 574 S.W.2d 52, 55 (Tenn. App. 1978). This court considered similar Tennessee instructions on malice in *Phillips v. Rose,* where the court held that instructions challenged by Stokes "reinforced the notion upon the jury that malice must be presumed." Likewise, the court has held violative of due process an instruction providing that when " 'a man kills another suddenly and without provocation, the law implies malice' ". *Charles v. Foltz,* No. 83-1595, slip op. at 9 (6th Cir., August 3, 1984). *See Phillips v. Rose,* 690 F.2d 79, 81.[1] The same instructions provide that malice is an essential element of the offense which the State is required to prove beyond a reasonable doubt, yet the instructions relieve the State of that burden by concluding that proof of one element, the homicide, is sufficient to create a presumption that another element, malice, exists. The instruction that malice is presumed "in the absence of evidence that would rebut" squarely places the burden on Stokes to prove absence of malice. This court has rejected the proposition

---

[1] The instruction deemed violative of due process in *Phillips v. Rose* provided:

> If a deadly weapon of any kind or character is handled in a manner so as to make the killing a natural or probable result, malice will be presumed from the use of the weapon.

Phillips v. Rose, 690 F.2d 79, 80.

that an instruction allowing a defendant to rebut the presumption cures the impermissible shifting of the prosecution's burden. *Engle v. Koehler,* 707 F.2d 241, 245 n.2 (6th Cir. 1983), *aff'd by equally divided court,* 104 S.Ct. 1673 (1984). Likewise, the instruction that malice may be presumed from the use of a deadly weapon is virtually indistinguishable from the instruction declared constitutionally defective in *Phillips.* This court has held violative of due process instructions allowing a presumption of malice from use of a weapon. *Harless v. Andersonj,* 664 F.2d 610, 611 (6th Cir. 1981), *rev'd on other grounds,* 459 U.S. 4 (1982).

An instruction is defective if a reasonable juror could interpret it as having a burden-shifting effect. *Phillips v. Rose,* 690 F.2d 79, 81 n.3; *Charles v. Foltz,* slip op. at 9. Clearly, a reasonable juror could construe these instructions as burden shifting. The State argues that any potential burden-shifting effect of the instructions is cured by the court's general instruction that the state has the burden to prove all elements of the offense beyond a reasonable doubt. This court has rejected such a contention in similar situations, *Engle v. Koehler,* 707 F.2d 241, 245; *Phillips v. Rose,* 690 F.2d 79, 81; and the contention has even less merit in light of the fact that the jurors returned and sought reinstruction on the malice issue.

Finally, the State contends that even if the instructions were impermissibly burden-shifting, the error was harmless. *Sandstrom* errors are tested by the harmless error standard. *Engle v. Koehler,* 707 F.2d 241, 246. "...[A] *Sandstrom* instruction can be deemed 'harmless' only if no rational juror could have concluded from the evidence of record that the perpetrator of the crime lacked the requisite intent." *Conway v. Anderson,* 698 F.2d 282, 285 (6th Cir. 1983). "...[I]f the defendant asserts lack of *mens rea,* a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial." *Engle v. Koehler,* 707 F.2d 241, 246.

The *Sandstrom* instructions do not constitute harmless error. Stokes challenged the issue of intent at trial by asserting accident as a defense. The evidence of malice was less than substantial, with Stokes' denial of hatred toward Pritchard conflicting with the testimony of witnesses that Stokes said Pritchard "needed to be dead a long time ago." The fact that the jury returned for reinstruction on malice indicates that the charge on malice was critical to its deliberations and highlighted the erroneous instructions. Rather than harmless, the instructions were likely prejudicial.

For the reasons expressed above, the judgment of the district court granting the writ is AFFIRMED, and the State shall release or retry petitioner within a reasonable period of time as set forth in the district court order.

APPENDIX B

No. 84-5324

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed November 28, 1984]

James Anderson Stokes,
Plaintiff-Appellee,

vs.

Herman C. Davis, Warden,
Defendant-Appellant.

ORDER

BEFORE: MARTIN, CONTIE, Circuit Judges and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Filed March 30, 1984]

No. 83-2193-G

James Anderson Stokes,
Petitioner,

vs.

Herman C. Davis, Warden,
Respondent.

ORDER GRANTING WRIT OF HABEAS CORPUS

Petitioner herein seeks habeas corpus relief under 28 U.S.C. Section 2254. The matter was referred to the United States Magistrate for report and recommendation. The magistrate's report was filed December 19, 1983. Respondent timely filed objections to the report.

The court has considered the magistrate's report, the memoranda of the parties and the entire record in this cause and hereby adopts the magistrate's report and recommendation. The magistrate's report and recommendation, along with the contents of this order, shall constitute the court's findings of fact and conclusions of law with respect to this matter.

Respondent in his objections to the magistrate's report claims first that the case of *Phillips v. Rose,* 690 F.2d 79 (6th Cir. 1982), is distinguishable from the present case. The magistrate dealt with this issue in his report and the court agrees with the magistrate's analysis.

Second, respondent contends that the magistrate was incorrect in finding that malice was a disputed element of the crime,

thus precluding a harmless error analysis. Respondent asserts that malice was not a disputed element in the instant case, that a harmless error analysis is appropriate, and that any error in the jury instruction on the element of malice was harmless beyond a reasonable doubt. The magistrate in this case does indicate his opinion that malice was a disputed element of the crime. Nevertheless, however, he went on to apply the harmless error analysis to this case. This court agrees with the magistrate that the court cannot find that the error in this case was harmless beyond a reasonable doubt, particularly in light of the jury's questions to the court about malice.

Accordingly, the writ of habeas corpus is granted. The state shall retry petitioner within a reasonable period of time or release him.

IT IS SO ORDERED.

/s/ Julia Smith Gibbons
United States District Judge

DATE: March 28, 1984

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE AT JACKSON
FEBRUARY 1980

State of Tennessee,
Appellee,

vs.

James Anderson Stokes,
Appellant.

No. 66

SHELBY COUNTY

The Honorable James C. Beasley, Judge

(Second Degree Murder)

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Memphis, Tennessee

RICHARD J. RYAN, JR.
Memphis, Tennessee

Opinion Filed: June 12, 1980

AFFIRMED

MARTHA CRAIG DAUGHTREY
Judge

OPINION

The appellant-defendant, James Anderson Stokes, was convicted of second degree murder and was sentenced to 25 years in prison, enhanced by a five year penalty for use of a firearm in the commission of the felony. He appeals, challenging (1) the constitutionality of the trial judge's charge on malice, (2) the use of a "remote" conviction to rebut the testimony of various character witnesses, (3) the State's failure to disclose the name of a trial witness, and (4) the admissibility of certain rebuttal testimony. We find no reversible error, and we therefore affirm the conviction.

There is no challenge to the sufficiency of the evidence in this case. The defendant did not dispute the fact that he shot the victim with a gun he had bought just a few hours earlier. He claimed that the gun discharged accidently as he handed it to the victim, who had asked to see the gun. The defendant said the victim "grabbed it and it went off." "What caused it to go off," he testified, "I don't know."

The State's proof indicated that the defendant went to a home in Memphis where the victim was a visitor, and, in the presence of several eyewitnesses, pulled a pistol and shot him, saying "the dirty son-of-a-bitch ought to have been dead long ago."

The trial judge's charge on second degree murder follows verbatim the instruction in Tennessee Pattern Jury Instructions. See T.P.I.—Crim. 20.04. That portion of the charge dealing with malice, to which the defendant now objects, has been previously examined by this court and found to be constitutional. See *Armes v. State,* 540 S.W.2d 279 (Tenn. Crim. App. 1976), applying *In re Winship,* 397 U.S. 358 (1970), in light of *Mullaney v. Wilbur,* 421 U.S. 684 (1975). We have reviewed the charge and find nothing in the instruction on malice which could have been taken by the jury as impermissibly shifting the burden of proof to the defendant. See *Sandstrom v. Montana,*

442 U.S. 510 (1979). Nor is there any indication that the instruction violated the ruling in *Bush v. State,* 541 S.W.2d 391 (Tenn. 1976), regarding conclusive presumptions. The jury was told that despite the presumption that all homicides are malicious, malice "may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the defendant, or exists in the evidence of the State." They were further instructed that "malice is for you to determine from the entire case, and you should look to all the evidence to determine whether the state has proven beyond a reasonable doubt the existence of malice."

The "presumption" mentioned in the instruction was neither conclusive nor did it impermissibly shift the burden of proof to the defendant. There was no error in the charge.

The defendant offered several character witnesses to testify to his reputation for "peace and quietude and good order in the community." At a jury-out hearing the prosecution presented evidence of the defendant's prior criminal record and asked permission to use it in rebuttal. The trial judge disallowed proof of a 1958 drunken and disorderly conduct incident and also that of a 1964 charge of driving while intoxicated, but he permitted questioning about a 1967 guilty plea to the charge of attempt to commit the felony of rape and a resulting one to five year penitentiary sentence, saying that it "goes right to the heart of this peace and quietude he's talking about." Thus on cross-examination each of the character witnesses testifying to the defendant's good reputation were asked if they knew of his prior felony conviction as a test of their "credibility and knowledge on which [they based their] opinion that [the defendant] enjoys a good reputation in the community in which he lives." In each instance, the Court gave the jury a contemporaneous cautionary instruction that "the question was merely asked to see if [the witness] really knows his reputation in the community...." The trial judge also gave a detailed instruction on the use of character testimony.

There is no proof of a *Morgan* violation in this case. See *State v. Morgan,* 541 S.W.2d 385 (Tenn. 1976). In the absence of a *Morgan* violation, the remoteness of character testimony goes to the weight and not to the admissibility of the evidence. *Strader v. State,* 208 Tenn. 192, 344 S.W.2d 546 (1961). We find no error in the trial court's ruling.

The defendant urges that the testimony of a prosecution witness, Earl D. Shaw, was erroneously admitted because his name was not included on the indictment, nor was it disclosed in response to the defendant's pre-trial motion for a list of State's witnesses. This question cannot be reviewed on appeal because there was no timely objection made to the witness's testimony, and thus the trial judge had no opportunity to exclude it. Under well-recognized Tennessee law the trial judge will not be put in error on matters not brought to his attention for correction at trial, absent "plain error." *Hawkins v. State,* 543 S.W.2d 606, 607 (Tenn. Crim. App. 1976); *Manning v. State,* 500 S.W.2d 913, 914 (Tenn. 1973).

Nor do we find reversible error in this witness's testimony on rebuttal. The defendant insists that Shaw's statements exceeded the proper bounds for rebuttal testimony, but, again, the record fails to reveal a contemporaneous objection, and the matter was not included in the defendant's motion for a new trial. Under Rule 3(e), Tennessee Rules of Appellate Procedure, the question is not subject to review on appeal.

Even if Shaw's testimony was reversible on the merits and was found to have been largely excludable, we conclude that its erroneous admission would not have affected the outcome of the trial. See Rule 36(b), Tennessee Rules of Appellate Procedure.

We find no reversible error in the record before us, and we therefore affirm the judgment of the trial court.

/s/ Martha Craig Daughtrey,
Judge

CONCUR:

/s/ Robert K. Dwyer, Judge

/s/ Allen R. Cornelius, Judge

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

[Filed September 8, 1980]

Shelby Criminal
C.C.A. No. 66

State of Tennessee,
Plaintiff-Appellee,

vs.

James Anderson Stokes,
Defendant-Appellant.

ORDER

Upon consideration of the application for permission to appeal and reply thereto, briefs of counsel and the entire record in this cause, the Court is of the opinion that the application should be and the same hereby is denied at the cost of appellant.

PER CURIAM